* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No. 76 of 2006**

Judgment reserved on: May 21, 2007

% Judgment delivered on: May 24, 2007

Commissioner of Income Tax
Delhi-IV, New Delhi ...Appellant

Through Mrs. Prem Lata Bansal, Advocate

Versus

M/s Gujarat Guardian Ltd.
M-38/1, International Business Centre
Connaught Place, New Delhi ...Respondent

Through Mr. Ajay Vohra with Ms. Kavita Jha, Advocates

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Revenue is aggrieved by an order dated 30th May, 2005 passed by the Income Tax Appellate Tribunal, Delhi Bench "F" in I.T. Appeals No.4118 and 4119 (Del) of 2001 relevant for the assessment years 1994-95 and 1995-96.

2. In this appeal under Section 260A of the Income Tax Act, 1961 (the Act), we are concerned only with the assessment year 1994-95.

3. The question that has arisen for our consideration is whether the assessee is entitled to depreciation on account of capitalization of engineering service fees paid to a foreign company or whether the assessee is entitled to a deduction under Section 35AB of the Act. According to the Tribunal, the assessee is entitled to depreciation on account of capitalization of engineering service fees and it is this conclusion that has been disputed by the Revenue.

4. The broad facts of the case are that the assessee set up a float

glass plant in Gujarat on the basis of technical know-how obtained from Guardian Industries Corporation, USA. The foreign company also deputed its technicians for supervising the setting up of the plant. During the financial year 1992-93, the assessee paid engineering service fees towards know-how to the foreign company. The amount paid was initially debited by the assessee under the head "deferred revenue expenditure" but later, on being advised that the engineering service fees having been incurred by the assessee prior to commencement of production are required to be capitalized, the assessee filed a revised return of income for the assessment year 1994-95 and also made the necessary entries for capitalization in its books of account.

5. The arrangement between the assessee and the foreign company was through a collaboration agreement dated 5th June, 1990. Paragraph 8.1 of this agreement records that the parties had entered into an engineering service and sub-licence agreement separately and that the latter agreement was identified as a "Float Plant Services Agreement". As per the collaboration agreement dated 5th June, 1990 the foreign company agreed to provide complete basic design,

engineering services, training and assistance to the assessee for setting up a float gas glass plant in consideration of a lump sum payment of US$ 7.5 million to be paid in three installments. Paragraph 8.2 of the collaboration agreement records that the foreign company would provide supervision services for the erection, commissioning and setting up of the float glass plant by making available personnel and equipment, materials and components suppliers. In so far as the float plant services agreement is concerned, that was intended to provide to the assessee engineering services needed to construct a float glass plant and services needed to provide for future process improvements in the operation of the float glass plant after it begins production on a commercial basis; to provide assistance in the day to day manufacturing operations of the float glass plant to ensure its efficient operation; and to grant to the assessee a sub-licence to practice certain inventions for the manufacture of flat glass by the float process in India and for the sale of such glass anywhere in the world.

6. The Assessing Officer disallowed the depreciation claimed by the assessee, inter alia, on the ground that it was entitled to a

deduction under Section 35AB of the Act. The Commissioner of Income Tax (Appeals) [CIT (A)] allowed the depreciation on the ground that the expenditure incurred by the assessee related to planning, design, installation, construction, etc., that is, towards the setting up of the plant only. This conclusion of the CIT (A) was disputed by the Revenue before the Tribunal.

7. There are two issues that actually arise for consideration. One is whether the collaboration agreement between the assessee and the foreign company was for setting up a float glass plant or for rendering technical know-how for the process of manufacture of float glass. The second issue that arises is whether the assessee is entitled to claim depreciation under Section 32 of the Act or deduction under Section 35AB of the Act.

8. In so far as the first issue is concerned, the Tribunal considered the provisions of paragraph 8.1 of the collaboration agreement and concluded that the agreement was only for setting up the float gas glass plant in consideration of a lump sum fee of US$ 7.5

million. Similarly, after considering paragraph 8.2 of the collaboration agreement, the Tribunal concluded that it deals with erection, commissioning and starting of the float glass plant.

9. On a review of the collaboration agreement, the Tribunal concluded that there was no doubt, and we think that this conclusion is quite correct on the facts of the case, that the payment made by the assessee to the foreign company was only for the purposes of setting up the float glass plant. It appears that bills that were produced by the assessee also indicated that payments were made for services of foreign technicians engaged for the purpose of setting up the float glass plant. All in all, therefore, the assessee was able to show that the engineering service fees paid to the foreign company were towards setting up of the plant and not for the manufacture and production of float glass.

10. With regard to the question whether the assessee is entitled to claim depreciation under Section 32 of the Act or deduction under Section 35AB of the Act, the Tribunal looked at the meaning of "know-how" as given in the Explanation to sub-section (3) of Section 35AB of

the Act. This Explanation reads as follows:

> "*Explanation:* For the purposes of this section, "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto)."

11. On a plain reading of the Explanation, it is clear that know-how means information or technique likely to assist in the manufacture or processing of goods. The payment made by the assessee to the foreign company was not in connection with information or technique likely to assist in the manufacture or processing of goods – the payment was made for setting up of a float glass plant. The payment for assistance in manufacture or processing of goods was the subject matter of a separate agreement entered into between the assessee and the foreign company.

12. This being the position, the Tribunal was quite right in holding that the collaboration agreement did not relate to the manufacture or processing of goods by the assessee. Consequently, it must be held that the assessee is entitled to depreciation under Section

32 of the Act and not for deduction under Section 35AB of the Act for the expenditure incurred, which was not relatable to the manufacture or processing of goods.

13. The question whether the assessee is at all entitled to depreciation under Section 32 of the Act in respect of a "plant" is not in dispute before us and, therefore, we need not give any finding in this regard except to record that the Tribunal found that the word "plant" in Section 43(3) of the Act is defined in very wide terms and technical know-how in the shape of drawings, designs, charts, plans, etc. falls within the definition of "plant" and is, therefore, a depreciable asset.

14. We find no error in the conclusions of the Tribunal. No substantial question of law arises for consideration.

15. The appeal is dismissed.

Madan B. Lokur, J

May 24, 2007 V.B. Gupta, J
ncg